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No. 05-380

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALBERTO R. GONZALES,
Attorney General,

Petitioner,

v.

LEROY CARHART, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE THOMAS MORE LAW CENTER, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to educating and defending the citizens of the United States with respect to their constitutional rights and liberties, particularly in defending the sanctity of human life. The Law Center accomplishes these goals through education, litigation, legislative assistance, and related activities.[1]

Thomas More Law Center attorneys have argued in defense of human life in state and federal courts and have submitted amicus curiae briefs on the subject in such courts as the Supreme Court of the United States, the United States Courts of Appeals for the Second, Eighth, and Ninth Circuits, and the Supreme Court of Kentucky.

In both *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), this Court made it clear that the State has a great interest in protecting the life of an unborn child, particularly when the pregnancy progresses past the first trimester. The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, defends the constitutional interest of the State in protecting innocent babies and seeks to prohibit a gruesome, inhumane procedure that must not be confused

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[1] This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

with any other right or medical procedure. The Law Center supports the ban of the partial-birth abortion procedure.

The Thomas More Law Center files this brief on behalf of petitioner and urges this Court to grant a writ of certiorari.

SUMMARY OF THE ARGUMENT

The language used by the pro-abortion movement to describe partial-birth abortion skews the perception of what the procedure entails and obscures the fact that Congress passed a constitutional law when it passed the Partial-Birth Abortion Ban Act of 2003. The Act carefully adhered to the standards laid out in *Stenberg v. Carhart*, 530 U.S. 914 (2000), for permissible regulation of abortion. To abandon this legislation would herald a new era in which the value of any pre-born human life would no longer be protected by our courts or our Constitution.

ARGUMENT

I.

THE USE OF EUPHEMISTIC LANGUAGE IN DESCRIBING ABORTION IS DESIGNED TO MASK A WHOLESALE ABROGATION OF HUMAN RIGHTS

The rhetoric of the pro-abortion movement distracts the public and the courts from the reality that each time an abortion is performed, a human life is destroyed. Phrases such as "potential life" serve to create a new and

illogical concept. As medical science demonstrates, life begins at the moment of conception. Abortion advocates have tried to blur this distinction in an attempt to sedate the public into believing that the atrocity of abortion is at times morally acceptable. Likewise, the idea of viability is problematic, because it is impossible to specify the exact time at which an unborn baby becomes viable. Semantic arguments on these topics are employed by abortion supporters to create a sliding scale of the value of human life. In many ways, this mirrors the historical linguistic gymnastics used to suppress other human groups such as blacks, women, and Jews.

Unfortunately, our country's history includes a time when blacks were kept as slaves and treated as property. The Supreme Court in the *Dred Scott* decision affirmed this practice. In that case, Chief Justice Taney explained:

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? *We think they are not*, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a *subordinate and inferior class of beings*, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and *had no rights or privileges* but such as those who held the power and the Government might choose to grant them.

Dred Scott v. Sandford, 60 U.S. 393, 404-05 (1856) (emphasis added).

It is clear that this point of view is no longer the position of the American people or of the courts. It is also clear that this quote applies word for word to the treatment of human babies who are aborted. To approve of abortion, one must believe that these babies are "a subordinate and inferior class of beings," subject to the authority of the dominant race, in this case, women. Language similar to that above was used in *Roe v. Wade*, 410 U.S. 113 (1973), when the Court said, "the word 'person' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

As it did in *Dred Scott,* this Court in *Roe* once again made the grave mistake of refusing to treat a particular human group as being worthy of constitutional protection. Just as the rights of blacks were eventually recognized, so must the rights of the unborn, another exploited and unprotected class of humans.

It is interesting that women should be so anxious to defend the right to subject another human being to such inhumane procedures, given that women themselves used to be treated as inferior to men. The very rhetoric used by women to promote their supposed right to abortion is the same rhetoric that they spent so many years fighting against when it was in reference to themselves. The argument based on a female's control over her own body is a fallacy because the control exerted is over another body that happens to reside inside of the female. No one would support the right of a parent to harm a child who happened to reside in his or her house, regardless of familial relation, according to an idea that the adult had complete

discretion to determine what fate should befall the child. Yet this is the alarming defense raised by women to discriminate against unborn children as a class of human beings subordinate and inferior to themselves.

For example, in her article, *My Body, My Property*, attorney Lori B. Andrews proposes that women should "have the autonomy to treat their own parts as property, particularly their regenerative parts."[2] An unborn child is not a "regenerative part" of a woman's body. The child is a person and to view the child as a part of another body does not make sense. At what point, then, would this "part" in which a woman has a "property" interest become its own body with its own interest?

Certainly the current body of abortion law, including *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000), consistently reaffirms the right of the State to regulate and even proscribe abortions of viable fetuses. In the district court's ruling below, however, the court specifically ignored this and declined to determine the constitutionality of the Act as it applied to viable fetuses. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1003 (D. Neb. 2004).

In plain language, the Act defends the right of a human being not to be subjected to an abortion procedure wherein his or her head is punctured, brain sucked out, and is killed. Congress clearly laid out the reason for this ban in saying:

> Congress and the States have a compelling interest in prohibiting partial-birth abortions. In

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[2] Lori B. Andrews, *My Body, My Property*, HASTINGS CENTER REPORT 16, October 1986, at 37.

> addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(G), 117 Stat. 1201.

Moreover, it is crucial to move past the sophistical language used to attack the Act. "[P]artial-birth abortions are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb.'" Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(I), 117 Stat. 1201. Thus, it is no longer possible to claim that the baby is merely a "part" of the mother. The baby has begun to enter the world and is cruelly killed by a gruesome procedure, one that our society would not permit for a criminal on death row, let alone an infant.

It is also farcical to say, as some pro-abortion advocates maintain, that because an unborn baby depends on its mother for sustenance, it is not a being of its own right. A one-year old child would also die if other humans did not take care of it, and yet there is no right within our society to puncture the skull of a one-year-old child, suck out its brains, and kill it.

In 1923, Adolf Hitler claimed that "Jews are undoubtedly a race, but not human."[3] As with abortion, there are two possible ways to view the Nazi Holocaust of Jewish people:

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[3] William Brennan, *Dehumanizing the Vulnerable: When Word Games Take Lives* 82 (Loyola Univ. Press) (1995) (quoting C.C. Aronsfeld, *The Nazi Design was Extermination, Not Emigration*, PATTERNS OF PREJUDICE 9, May-June 1975 at 22).

Jews were less than human, or Jews were people and their murder was approved. The same is true of an unborn baby. Some members of our society have decided that a woman has the right to terminate a pregnancy. This means that either an unborn baby is viewed as less than human, or that our jurisprudence now approves the killing of babies.

In his book, *Dehumanizing the Vulnerable*, William Brennan notes that in a popular German pamphlet printed in 1942, Jews were described as "sub-human, that biologically seemingly complete creation of nature with hands, feet and a kind of brain, with eyes and mouth . . . [and] is only a rough copy of a human being."[4]

Such semantic exercises are identical to the propaganda of the pro-abortion movement. To justify abortion, one must cling to the myth that a baby within the womb is only a "rough copy" of a person. This view can only be supported by fallacious arguments such as these, because it misrepresents the reality of the situation. An unborn baby is not a "rough copy" of a human being. An unborn baby is a miniature human being that has started on the pathway of development that every human being travels when an egg is fertilized and human life has commenced.

II.

FETAL PAIN IS EXPERIENCED BY INFANTS IN THE WOMB

Some opponents of the partial-birth abortion ban mistakenly claim that the baby does not feel pain when it

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[4] *Id.* at 83 (quoting Clarissa Henry and Marc Hillel, *Of Pure Blood* (Eric Mossbacher, trans. 1976) at 32).

is so violently destroyed. Along those lines, it also has been wrongly claimed that the anesthesia administered to a woman undergoing an abortion kills the baby before the abortion procedure, thus causing no pain to the baby during the abortion.[5]

These are yet other examples of pro-abortion propaganda that deceive the public and cloud the true issue. In testimony before the Senate Judiciary Committee, the American Society of Anesthesiologists represented that "(a) the claim that anesthesia kills a fetus/baby has

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[5] In the Addendum to *Spreading the Myth that Anesthesia Kills*, January 2, 1996, memo to Science and Medicine Editors/Reporters from Douglas Johnson, National Right to Life Legislative Director http://www.nrlc.org/abortion/Fetal_Pain/Anesthesia%20Myth%20Memo.pdf (citations omitted), Douglas Johnson explains:

> Far from dying out, the "anesthesia myth" continues to be disseminated to ever-wider audiences by advocates, editorial boards, reporters, and others. [For example:]
>
> On December 15, the New York Daily News (circulation 725,000) ran an editorial defending partial-birth abortions, which said:
>
> The fetus is partially removed from the womb, its head collapsed and brain suctioned out so it will fit through the birth canal. The anesthesia given to the woman kills the fetus before the full procedure takes place. But you won't hear that from the anti-abortion extreme. It would have everybody believe the fetus is dragged alive from the womb of a woman just weeks away from birth. Not true.

In fact, however, as Dr. David H. Chestnut explained to Congress, "This is nonsense . . . the vast majority of women who undergo anesthesia for surgery during the second or third trimester of pregnancy subsequently deliver a healthy baby." *Hearing before the Subcommittee on the Constitution Committee of the Judiciary, U.S. House of Representatives*, March 21, 1996 (statement of David H. Chestnut, M.D., Professor and Chairman of the Department of Anesthesiology, and Professor of Obstetrics and Medicine at the University of Alabama at Birmingham), http://www.nrlc.org/abortion/Fetal_Pain/Chestnut%20fetal%20 pain%20testimony.pdf.

'absolutely no basis in scientific fact,' and (b) the claim is 'misleading and potentially dangerous' to pregnant women, since it may deter them from consenting to be anesthetized for medically necessary procedures."[6]

If the pro-abortion movement is so willing to spread lies, even ones that are potentially harmful to pregnant women, their claims warrant a certain amount of skepticism, especially when medical opinions offered by abortionists directly contradict documented medical evidence.

Supporters of the partial-birth abortion procedure are intent on obscuring the medical likelihood that an unborn baby feels pain during the abortion procedure. In his dissent in *Stenberg*, Justice Clarence Thomas includes testimony from a nurse who had observed a partial-birth abortion:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

Stenberg, 530 U.S. at 1007. This vivid description of the fetal reaction to the banned procedure clearly illustrates the pain felt by a baby during a partial-birth abortion procedure.

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[6] *Spreading the Myth that Anesthesia Kills*, January 2, 1996 memo to Science and Medicine Editors/Reporters from Douglas Johnson, National Right to Life Legislative Director, http://www.nrlc.org/abortion/Fetal_Pain/Anesthesia%20Myth%20Memo.pdf.

When asked whether the fetus feels pain during a D&X abortion (the term used by abortionists for partial-birth abortion), Dr. Martin Haskell, an abortionist, responded,

> Neurological pain and perception of pain are not the same. Abortion stimulates fibers, but the perception of pain, the memory of pain that we fear and dread are not there. I'm not an expert, but my understanding is that fetal development is insufficient for consciousness. It's a lot like pets . . . we ascribe human-like feelings to them, but they are not capable of the same self-awareness we are.[7]

This entire quote can be broken into pieces and exposed for the lie that it is. For Haskell's statement about the memory of pain to make sense, he would also have to claim that an infant outside the womb would not feel pain for the same reason. And yet when stuck with a diaper pin, a baby reacts to the physical pain she feels, even if she had never had a "memory" of that experience before.

The same problem applies to Haskell's theory of fetal consciousness and self-awareness, because it would be equally applicable to a one-day old infant. It is clear that an infant's capability for "consciousness" cannot be the test for whether it is human, as opposed to "human-like."

It must also be kept in mind that the D&X procedure can be, and is, used to terminate pregnancies *after* the baby could be viable. To make Haskell's statement above

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[7] *An Interview with W. Martin Haskell, M.D.*, Cincinnati Medicine, Fall 1993, http://www.nrlc.org/abortion/pba/Haskell%20Cincinnati%20Medicine.pdf.

logical, one would have to believe that the same infant, one moment in the womb and the next moment delivered, has completely different characteristics. It is a nonsensical proposition to say that the baby is like a "pet" in the first moment and then dramatically transforms into a human being in the next moment.

In her testimony before the Subcommittee on the Constitution, Dr. Jean A. Wright provides a medical explanation of the development of the pain system in a fetus. She points out that

> Anatomic studies have shown that the density of the skin pain fibers . . . in the late fetus and newborn infant may equal or exceed that of adult skin. . . . Traditionally, lack of myelination (or the layer around the nerve fibers) has been proposed as an index of immaturity in the neonatal nervous system and used frequently to support the argument that neonates and infants are not capable of pain perception. However, pain (nociceptive) impulses in adults are conducted by unmyelinated or thinly myelinated fibers.[8]

Given these facts, a fetus has the physical system in place to ensure a painful reaction to destructive stimuli, such as scissors inserted into the back of the skull. In addition, Dr. Wright notes

> Ultrasonographic findings report specific fetal movements in response to needle punctures in

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[8] *Hearing before the Subcommittee on the Constitution Oversight Hearing*, (statement of Jean A. Wright, M.D., Associate Professor of Pediatrics and Anesthesia at Emory University School of Medicine), http://www.nrlc.org/abortion/Fetal_Pain/Wright%20testimony%20on%20fetal%20pain.pdf. (citations omitted).

> utero. Moreover, a controlled study of intrauterine blood sampling and blood transfusions in fetuses between 20 and 34 weeks of gestation showed that hormonal responses were consistent with fetal perception of pain, and were correlated with the duration of the painful stimulus.[9]

This medical data shows how unscientific Haskell's "pet" theory truly is and illustrates that partial-birth abortion supporters have no problem deceiving the public in order to advance their agenda.

III.

A RULING THAT THE PARTIAL-BIRTH ABORTION BAN IS UNCONSTITUTIONAL WOULD CEMENT THE AVAILABILITY OF ABORTION ON DEMAND

In his concurring opinion in *Roe*, Chief Justice Burger wrote, "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices. . . . Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Roe*, 410 U.S. at 208 (Burger, J. concurring).

Congress passed the Act to make certain that this statement had continuing validity in our country. The lower court's decision to enjoin enforcement of the Act, however, signals that abortion on demand has indeed become the order of the day in this country. The Act carefully adhered to the standards laid out in *Stenberg* for permissible regulation of abortion, and to abandon this

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[9] *Id.* (citations omitted).

legislation would herald a new era in which the value of any pre-born human life would no longer be protected by our courts or our Constitution.

This Court should grant a writ of certiorari in this action and overturn the decision of the lower court. This Court should also use this case as the opportunity to reconsider and reject the incorrect reasoning that supports the decisions in *Roe, Casey,* and *Stenberg*. The time has come for this Court to prevent the grave injustices, which have resulted from those decisions, from continuing.

CONCLUSION

This Court should grant a writ of certiorari.

Respectfully submitted,

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BRIEF OF MARGIE RILEY AND LAURETTE ELSBERRY AS AMICI CURIÆ IN SUPPORT PETITIONER WITH APPENDIX

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STATEMENT OF INTEREST[1]

Amici are individual activists seeking an end to abortion as it impinges on a member of Sovereignty, Posterity. They share the views of counsel who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, downtrodden, and oppressed.

Margie Reilly graduated from St. John's University, Jamaica, New York with a *summa cum laude degree* in Management. Number two in her class, Beta Gamma Sigma Business Honor Society. She is the granddaughter of a former United States Congressman John Rainey of Illinois, deceased. Most of her career has been with the Federal Government: Defense Logistics Agency, NYC, NY and McClellan AFB, N Highlands, CA as well as Social Security Administration where she retired early as a service representative. She is now employed as a substitute schoolteacher with San Juan Unified School District and Sacramento City School District where she takes K-12 assignments on a part time basis and specializes in preschool and Head Start early childhood programs. She has been actively involved in the prolife movement for many years as a sidewalk counselor, member of her Diocesan prolife committee and supports many prolife causes including Priests for Life, American Life League, Prolife Action League of Chicago, National Right to Life, Bishop Gallegos Maternity Home, SOHLNET, Couple to Couple League, Loaves and Fishes, Sacramento and Sacramento Food Bank and other worthy charities. She participated in the Washington, D.C. March for Life in 2001. Most recently, she testified before the Sacramento County Board of Supervisors against a "no pro-

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[1] Lead Counsel for *Amici Curiae* authored this brief in its entirety in collaboration with the Pacific Justice Institute. No person or entity, other than the Pacific Justice Institute and the named *Amici curiae*, associates, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief.

test bubble zone" that was enacted specifically to stifle the free speech rights of prolife activists at abortion clinics and medical facilities in the County.

Laurette Elsberry has been employed over 40 years by the State of California, the most recent 20 years as a criminal analyst, has been victimized for her prolife activities and participated in the editing a number of briefs on the abortion issue. She has been active in many educational projects involving abortion and has participated in vigils for the unborn. She has also given testimony at the State Supreme Court regarding the qualifications of State Court Justices.

Lead Counsel is an affiliate of the Pacific Justice Foundation and has presented similar *Amici Curiae* Briefs in this court.[2] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with pro-life groups, has concentrated his practice in the areas of Civil Rights, Human Rights, Constitutional Law, Criminal Defense, and authored two articles on Abortion: Lynch, *Posterity: A constitutional Peg for the Unborn*, 45 AJJ 401 (Notre Dame Law School. 1995) (Hereinafter, LYNCH II); Lynch, ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE; A PROSPECTIVE POLICY (© 1987), http://www.jamesjosephlynchjr.com/ProlifePages/ARTICLES/ABORTION.DOC, (Hereinafter, LYNCH I). He lived four years in England where he engaged in a self-directed study of the English Political System from the

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[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (For Appellant); *Ohio v. Akron Reproductive Center*, 497 U.S. 502 (1990) (For Appellant); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) (For Minnesota; *2* Briefs); *Bray v. Alexandria*, 506 U.S. 263 (1993) (For Petitioner). Counsel has also presented an *Amici* brief in other unrelated cases. *Walters* v. *NARS*, 473 U.S. 305 (1925) (*amicus Curiae* Andrew Groza for respondent); *Dickerson v. USA* (*Amicus Curiæ* Rutherford Institute for Petitioner), 530 U.S. 428 (Rutherford Institute for petitioner). While not filed, *Turnock v. Ragsdale*, 503 U.S. 916 (1992) was dismissed after a tentative opening brief was submitted to ACLU for review prior to filing. (For Appellant)

inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

Pacific Justice Institute is a non-profit 501(c)(3) legal defense organization specializing in the defense of religious freedom, parental rights, protection of life, and other civil liberties. Pacific Justice Institute works diligently, without charge, to provide their clients with legal support and assistance in each of those areas of the law in order to secure the rights and freedoms inherent to all Americans.

This case touches and concerns the continuing validity *of Roe v. Wade,* 410 U.S. 113 (1973) and its *progeny,* and, as such, a decision herein will affect not only the laws of the State of California, but all of its sister states and territories of the United States.[3] This Court's *Amici* are concerned about the inclusion of unborn and partially born children as present members of "Posterity" in the Preamble of the Constitution, and are concerned, and have been concerned for some time, that unborn children have been unrepresented or under-represented in court in the years of litigation that have followed Roe in 1973. Counsel was convinced then, and *Amici* are convinced now, that the Court was misled as to the meaning of "personhood." It is *Amici curiae's* belief that unborn and partially born children are present members of 'Posterity' in the Preamble of the Constitution, and it is imperative, for the preservation of a basic respect for human life and the values enshrined in the Constitution of the United States, that these children be recognized as present members of 'Posterity" entitled to protection.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1. An important and compelling federal question is

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[3] Cases in Nebraska and New York are pending appeal regarding the same, or similar issues. See, Carhart et al v. Ashcroft, DNE # 4:03-cv-03385-RGK, on appeal, 8th Cir., # 04-3379; National Abortion, et al v. Ashcroft, SDNY # 1:03-cv-08695-RCC, on appeal, 2nd Cir., 04-5201.